No. 87-759

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In the Supreme Court of the United States

OCTOBER TERM, 1987

ANDREW A.R. BURNS
SECOND LIEUTENANT, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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STEPHANIE C. SPAHN
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United States Army

QUESTION PRESENTED

Whether petitioner was denied his fifth amendment right to due process when the Army Court of Military Review independently reassessed petitioner's sentence rather than order a rehearing on sentence where said court had opined that the admission of certain evidence was prejudicial error.

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ANDREW A.R. BURNS
SECOND LIEUTENANT, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner Andrew A.R. Burns respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at ___ M.J. ___ (C.M.A. 1987) (Appendix A). The opinion of the Army Court of Military Review is unreported, CM 447682 (A.C.M.R. 1986) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 11, 1987, affirming petitioner's conviction dated October 30, 1986. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person . . . shall be deprived of liberty or property, without due process of law."

The Uniform Code of Military Justice (hereinafter cited as UCMJ), 18 U.S.C. 801 et. seq. (1984) provides:

> Article 66(c): In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

STATEMENT OF THE CASE

Contrary to this pleas, petitioner was found guilty of involuntary manslaughter in violation of Article 119, UCMJ. Petitioner was tried by a court-martial composed of officer members and was sentenced to dismissal from the service and forfeiture of all pay and allowances.[1]

At trial, the government introduced, over objection, Prosecution Exhibits 30 and 31 (Department of Defense Directive 1010.7 and Interim Change No. 103 to Army Regulation 600-85, respectively)[2] which purported to establish numerical blood alcohol levels beyond which a person was either driving while intoxicated or drunk on duty. These two exhibits set

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[1] The sentence was approved by the convening authority pursuant to Article 60, UCMJ.

[2] Department of Defense Directive Number 1010.7, Drunk and Drugged Driving by DoD Personnel (10 Aug. 83); Army Regulation 600-85, Personnel-Alcohol and Drug Abuse Prevention and Control Program (C3, 26 Aug. 85).

forth different standards of measure for making determinations of impairment from alcohol ingestion. Additionally, the government introduced evidence of a German blood alcohol test performed on petitioner's blood, which set forth yet a different standard for measuring blood alcohol content.

The Army Court of Military Review found none of these three standards had any probative value to the court-martial in the absence of testimony showing the actual physiological effect of petitioner's blood alcohol level or relating same to the metric standard set forth in Prosecution Exhibit 30. *United States v. Burns*, slip op. at 2 (Appendix B). The decision below noted that all of the available eyewitnesses testified that petitioner was not intoxicated. *Id.* The Army Court of Military Review specifically made a factual finding that the evidence failed to establish that petitioner was operating a motor vehicle while under the influence of alcohol and went on to hold that the admission of Prosecution Exhibits 30 and 31 was prejudicial error. *Id.* Despite this holding, the court reviewed the admissible evidence of record (i.e., that petitioner had operated his vehicle substantially in excess of the posted speed limit and left of center on a two-land road) and found it sufficient to support a finding of guilty to the lesser included offense of negligent homicide under Article 134, UCMJ.[3] The Army Court of Military Review then reassessed petitioner's sentence, setting aside the forfeitures and approving only the dismissal. The issue granted by the Court of Military Appeals, as a prerequisite to this Court, jurisdiction, was as follows:

> WHETHER THE ARMY COURT OF MILITARY REVIEW ERRED BY FAILING TO DISMISS THE CHARGE AND ITS SPECIFICATION AND SET ASIDE THE SENTENCE OR TO ORDER A REHEARING ON FINDINGS AND SENTENCE WHEN IT FOUND PREJUDICIAL ERROR HAD BEEN COMMITTED BY THE MILITARY JUDGE DURING THE FINDINGS PORTION OF THE TRIAL.

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[3] Negligent homicide is an offense peculiar to military law. It merely requires that the accused cause the death of another by way of simple negligence. *See* United States v. Spicer, 20 M.J. 188 (C.M.A. 1985) (summary disposition), *cert. denied* 474 U.S. 924 (1985).

REASONS FOR GRANTING THE WRIT

The men and women who serve in the armed forces are entitled to the same standard of due process that is provided civilians unless there is clear evidence that such process would detract from the military's ability to perform its mission.[4] Petitioner realizes that the military's special mission prevents the use at courts-martial of the identical procedures employed by federal criminal courts.[5] Petitioner submits, however, that the government has failed to demonstrate any compelling reasons that the Army Court of Military Review should be allowed to independently reassess the sentence imposed by a court-martial in the face of clear prejudicial error; particularly when such a practice would not be implemented in other federal appellate courts and is not explicitly allowed by statute.

PETITIONER WAS DENIED HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS WHEN THE ARMY COURT OF MILITARY REVIEW INDEPENDENTLY REASSESSED PETITIONER'S SENTENCE RATHER THAN ORDER A REHEARING ON SENTENCE WHERE SAID COURT HAD OPINED THAT THE ADMISSION OF CERTAIN EVIDENCE WAS PREJUDICIAL ERROR.

A. *Petitioner is Entitled to Due Process in His Presentencing Hearing.*

This Court has held that "the sentencing process, as well as the trial, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). In *Gardner*, this Court further opined:

> Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to effective assistance

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[4] *See* Burns v. Wilson, 346 U.S. 137, 140 (1953).

[5] *See e.g.*, Mil.R.Evid. 101(b)(1) (the rules of evidence generally applied in federal criminal courts will apply at courts-martial unless they conflict with specific provisions of military law).

> of counsel. [citations omitted]. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of a sentence even if he may have no right to object to a particular result of the sentencing process.

Id. The court of Appeals for the District of Columbia has followed this precedent and has held that due process continues to operate in the sentencing process. *United States v. Lemon*, 723 F.2d 922, 933 (D.C. Cir. 1983). In *Lemon*, the Court of Appeals opined that "courts must be concerned not merely when a sentencing judge has relied on demonstrably false information, but 'when the sentencing process created a significant *possibility* that misinformation infected the decision.' " (citations omitted; emphasis in original). *Id.* The Court of Appeals in *Lemon* remanded the case to the district court for a rehearing on sentence because the district court may have based the original sentence on the accused's alleged membership in an organization protected by the First Amendment. *Id.* at 942-43.

After convicting the petitioner in the present case of involuntary manslaughter for a vehicular accident in which a death occurred, the court members were improperly allowed to consider, in their determination of an appropriate sentence, evidence of a blood alcohol test performed on petitioner's blood and two Army regulations which purported to establish at what blood alcohol level a person is legally intoxicated. The Army Court of Military Review held that admission of the Army regulations was error in the absence of any testimony showing the physiological effect of petitioner's blood alcohol level. Moreover, it specifically found that the evidence of record was insufficient to establish that petitioner was driving his vehicle under the influence of alcohol. Despite its ruling that prejudicial error had affected the findings of guilty rendered by the court-members and its affirmance of a conviction of a lesser-included offense rather than the charged offense, the Army Court of Military Review determined that the prejudice would have only affected the forfeitures adjudged.[6]

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[6] This ruling afforded petitioner no tangible relief for two reasons. First, a soldier may be placed on excess leave while he is pending completion of

Petitioner was denied due process in the sentencing portion of this trial both by the military judge and the Army Court of Military Review. The military judge denied petitioner his due process rights by allowing the court members to determine a sentence while under the mistaken belief that petitioner had been driving his automobile while under the influence of alcohol. In a situation where someone dies as a result of a collision between automobiles, whether or not the party held responsible was under the influence of alcohol at the time of the collision naturally would have a significant impact on a determination of the appropriate punishment. In light of the extensive presentencing evidence presented on petitioner's behalf, the severity of the sentence adjudged is strong evidence that petitioner was prejudiced by the members' mistaken belief that he had been driving under the influence of alcohol. The Army Court of Military Review failed to remedy and actually perpetuated this prejudice by reassessing the petitioner's sentence rather than ordering a rehearing on the sentence.

B. *Federal Practice is to Remand a Case to a Trial Court when the Sentence was Based on a Violation of the Law.*

In *Solem v. Helm*, 463 U.S. 277, 290 (1983), this Court reasoned that "substantial deference" should be given "to the discretion that trial courts possess in sentencing convicted

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appellate review when no confinement has been adjudged. Para. 5-4, Army Reg. 630-5, Personnel Absences – Leaves and Passes (C10, 15 July 1984). Petitioner was placed on excess leave. While on excess leave, a soldier is in a no pay status. *Id.* A soldier may be required to begin excess leave on the date the sentence is approved by the convening authority. *Id.* Because the sentence to forfeitures is executed at the same time a soldier is placed on excess leave, no pay is forfeited since the soldier is in a no pay status. Second, a sentence to dismissal from the service and total forfeitures is illegal. United States v. Warner, 25 M.J. 64, (C.M.A. 1987). Therefore, the decision of the Army Court of Military Review to set aside petitioner's forfeitures provided him no sentencing relief and did not eradicate the prejudicial effect of the inadmissible evidence.

criminals." In *Solem*, this Court was faced with the issue of whether a sentence under an habitual offender statute was constitutionally disproportionate. *Id.* at 284. In dictum, this Court opined that "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits." 463 U.S. at 290, n.16. The Court of Appeals for the Eighth Circuit also has held that "it is not this Court's function to substitute it's judgment for that of the district court with respect to sentencing." *United States v. Russell*, 724 F.2d 725, 726 (8th Cir. 1984). The circuit court determined that it would not intrude upon the district court's sentencing function unless the accused could show by clear and convincing evidence that the district court had abused its discretion. *Id.*

Other Federal precedent indicates that when a finding of guilty of only a lesser-included offense, rather than the charged offense, is supported by the evidence of record, the case will be remanded to the district court for resentencing on the lesser-included offense. *See United States v. Franklin*, 728 F.2d 994 (8th Cir. 1984) (court found evidence sufficient to support conviction for simple possession of cocaine, but insufficient to prove intent to distribute the cocaine; remanded case for resentencing on the lesser-included offense); *United States v. Swiderski*, 548 F.2d 445 (2nd Cir. 1977) (evidence was sufficient to support conviction for simple possession of cocaine, but not to support greater offense; case was remanded for resentencing on the lesser included offense); *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967) (court held evidence of record supported conviction of second degree murder, a lesser-included offense of the charged offense; however, court recognized that the trial judge had a better vantage point for determining whether the accused had been prejudiced; court remanded case with order for entry of judgment of guilty to second degree murder and a sentence rehearing, unless the district court determined a new trial was in order). In light of federal precedent, when

the Army Court of Military Review affirmed a conviction for the lesser-included offense of negligent homicide in the present case, it should have returned the case to the trial level for a rehearing on sentence.

Prior to 1 November 1987, the federal circuit courts of appeal had the authority to correct sentences that were imposed in violation of the law. 18 U.S.C. § 3742(e) (1985). However, the law now requires the courts of appeal to remand cases for further sentencing proceedings when the sentence was imposed in violation of the law. 18 U.S.C. § 3742(e) (as amended Pub.L. 99-646, § 73(a), Nov. 10, 1986, 100 Stat. 3617). Congressional intent is clear that trial courts are the proper forum for the determination of appropriate sentences. Petitioner should not be denied similar due process rights merely because he is in the military.

C. *The Army Court of Military Review can Reassess Sentences under Article 66(c), UCMJ, only when a Sentence has been Properly Adjudged by a Court-martial.*

A properly adjudged sentence is a jurisdictional requirement before any supervisory or appellate authority may act. Rule for Courts-Martial 1107(d), *Manual for Courts-Martial, United States, 1984*. The authority of the Army Court of Military Review to determine sentence appropriateness under Article 66(c) presupposes a properly adjudged sentence by a court-martial. Article 66 does not explicitly allow for sentence reassessment after a finding of prejudicial error that changed the court-martial's findings on the merits of the case. In *United States v. Sales*, 22 M.J. 305, 307-308 (C.M.A. 1986), the Court of Military Appeals concluded that Courts of Military Review had the authority to reassess sentences after finding prejudicial error rather than ordering a sentence rehearing. Petitioner submits that the decision in *Sales* is an improper and unjustified interpretation of congressional intent and, therefore, was wrongly decided.

In the present case, petitioner's sentence was not properly adjudged because it was affected by prejudicial error. Article 66(c) does not constitute a congressionally-approved basis for the Army Court of Military Review to substitute its opinion

for a valid sentence properly adjudged by a court-martial. Petitioner is entitled to be sentenced by a *court-martial* for the offense for which he is legally responsible. Where, as here, findings are dismissed on appeal, the sentence should be set aside and a rehearing ordered thereon.

In *United States v. Sales*, 22 M.J. at 307, the Court of Military Appeals relied on *Jackson v. Taylor*, 353 U.S. 569 (1957) to justify sentence reassessment by an intermediate appellate court. The present case is distinguishable from *Jackson v. Taylor*, and the lower court's reliance thereon was in error. In *Jackson v. Taylor*, the petitioner, in a habeas corpus proceeding, attacked the validity of his sentence. 353 U.S. at 570. At trial by court-martial, Jackson had been found guilty of premeditated murder and attempted rape. He received an aggregate sentence of life imprisonment for both offenses. On appeal, the Army Board of Review determined that Jackson was not guilty of premeditated murder and reduced his sentence to the maximum confinement allowed for attempted rape (i.e., 20 years). *Id.* Jackson did not raise the issue of whether the Board had to authority to modify sentences when he appealed to the Court of Military Appeals for a grant of review; instead, he raised it for the first time in his writ for habeas corpus. *Id.* at 572. In his habeas petition, Jackson complained of no deprivation of constitutional rights, but argued that the Board should have ordered a rehearing or should have released him from confinement because it had no authority to impose the 20-year sentence. *Id.* This Court opined: (a) military law requires an aggregate sentence for multiple offenses, (b) the power to re-adjust sentences does not rest with court members, (c) military law provides that an aggregate sentence must be imposed and a board of review may modify the sentence in a manner it finds appropriate, and (d) there was no authority in the Uniform Code of Military Justice for a rehearing procedure. *Id.* at 574, 575, 579). This Court affirmed the decision of the lower court. *Id.* at 580.

In the present case, petitioner raised the issue of whether the Army Court of Military Review had the authority to reassess his sentence after it found that prejudicial error had

affected his conviction when he appealed his case to the Court of Military Appeals. Petitioner asserts in his appeal to this Court that his fifth amendment right to due process has been violated by the failure of the military appellate courts to order a sentence rehearing. Furthermore, the current Uniform Code of Military Justice includes a procedure which permits military appellate courts to order a rehearing on sentence. *See* Article 66(d), UCMJ. Therefore, the holding in *Jackson v. Taylor*, 353 U.S. 569 (1957), is inapplicable in petitioner's case.

The dissenting opinion in *Jackson v. Taylor* correctly points out that the Uniform Code of Military Justice does not give the Army Board of Review the authority to impose original sentences. *Id.* at 581-82 (Brennan, J., dissenting). The current Code does not allow such a practice either. Petitioner deserves a sentence rehearing free from the adverse effect of prejudicial, inadmissible evidence.

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CONCLUSION

This Court must find that Article 66(c) does not allow reassessment of a sentence affected by prejudicial error. Anything less clearly thwarts constitutional due process provided accuseds in military trials. Soldiers, in the absence of a clear showing that a compelling national interest requires otherwise, are entitled to have their sentences determined by fact-finders in criminal trials as are all other United States citizens.

Respectfully submitted,

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Appendices

UNITED STATES COURT OF MILITARY APPEALS.

USCMA Dkt. No. 56865/AR
CMR Dkt. No. 447682

UNITED STATES, APPELLEE

v.

ANDREW A. R. BURNS (129-40-9886), APPELLANT

ORDER

On consideration of the petition for review of the decision of the United States Army Court of Military Review in light of *United States v. Sales,* 22 M.J. 305 (C.M.A. 1986), it is by the Court this 11th day of September, 1987

ORDERED:

This said petition is hereby granted on the issue raised by appellate defense counsel; and

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (SPAHN)
Appellate Government Counsel (FRYE)

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 447682

UNITED STATES, APPELLEE

v.

SECOND LIEUTENANT ANDREW A. R. BURNS, 129-40-9886,
UNITED STATES ARMY, APPELLANT

1st Armored Division
D. Morgan, Military Judge

For Appellant: Captain Stephanie C. Spahn, JAGC (argued); Major Marion E. Winter, JAGC, Captain Pamela O. Barron, JAGC (on brief).

For Appellee: Captain Mark E. Frye, JAGC (argued); Colonel Norman G. Cooper, JAGC, Lieutenant Colonel Gary F. Roberson, JAGC, Captain Denise K. Vowell, JAGC (on brief).

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30 October 1986

Before DeFORD, De GIULIO, and RICHARDSON
Appellate Military Judges.

MEMORANDUM OPINION

DeFORD, Senior Judge:

The appellant was convicted, contrary to his pleas, by a general court-martial composed of officer members of involuntary manslaughter in violation of Article 119, Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 919 (1982). His approved sentence included a dismissal and forfeiture of all pay and allowances.

The evidence in this case arose from an unfortunate automobile accident which occurred in the early morning

hours of 6 October 1984 in the Federal Republic of Germany. The accident resulted in the death of Angela Hess, a German National.

The prosecution sought to plead and prove three separate wrongful acts which they believed jointly or severally constituted culpable negligence. The prosecution alleged appellant operated his automobile: (1) substantially in excess of the posted speed limit; (2) left of center on a two-lane road; and (3) while intoxicated by alcohol. The evidence of record clearly establishes the first two wrongful acts beyond any reasonable doubt. However, with regard to intoxication, the prosecution's evidence was insufficient.

The prosecution introduced evidence of a German blood alcohol test which showed that the appellant's blood contained 1.1 milliliters of alcohol per gram of whole blood. No evidence was offered to show the effect of that finding. They did introduce, over objection, Prosecution Exhibits 30, Department of Defense Directive 1010.7, and 31, Interim Change No. 103 to Army Regulation 600-85. These exhibits appeared to establish, respectively, that intoxicated driving includes operating a vehicle with a blood alcohol content of .1 percent of weight by volume of alcohol in the blood based upon grams of alcohol per 100 millimeters of blood, and army personnel on duty shall not have blood alcohol content of .050 percent, based on percentages of milligrams of alcohol per 100 millimeters of blood. Thus, three different metric standards were admitted into evidence, none of which had any probative value to the courts-martial in the absence of testimony showing the actual physiological effect of the German Blood Alcohol Test or otherwise relating same to the other metric standard.[1] Furthermore, the testimony of eyewitnesses who observed the appellant during the evening and early morning hours prior to the accident all testified the appellant was not intoxicated. In summary, the admissible evidence of record fails to sustain that appellant was operating a motor vehicle while under the influence of alcohol. Consequently, we view

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[1] Interim Change 103 to Army Regulation 600-85, cited alone, did not relate to driving motor vehicles and had no evidentiary probative value to the issues in this case.

the admission of the foregoing documents as prejudicial error. *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 402, 403: *United States v. Barnes,* 8 M.J. 115, 116 (C.M.A. 1979).

The remaining evidence of record upon which the appellant's conviction of involuntary manslaughter was based, when considered in light of the totality of the circumstances, fails to convince us beyond a reasonable doubt that the accused's negligence in this case shows a culpable disregard for the foreseeable consequences to others. However, we are satisfied that the admissible evidence of record does sustain a finding of guilty of the lesser included offense of negligent homicide, in violation of Article 134, UCMJ. *See* UCMJ art. 59; *United States v. Patterson,* 34 C.M.R. 22 (C.M.A. 1964); *United States v. Gambill,* 40 M.J. 647 (A.B.R. 1969).

The court has considered the remaining allegations of error and finds them to be without merit.

Accordingly, the court affirms only so much of the findings of guilty of the Charge and its Specification as finds that the appellant did, at the date, time and place alleged, unlawfully kill Angela Hess by negligently driving a vehicle at an excessive speed and by driving said vehicle into the lane of oncoming traffic, thereby causing said vehicle to strike the vehicle containing Angela Hess in violation of Article 134, UCMJ.

Reassessing the sentence based upon the above-indicated error and the entire record, the court affirms only so much of the sentence as provides for a dismissal from the service.

Judge De GIULIO AND Judge RICHARDSON concur.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

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